

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Entertainment – Advance/Newhouse Partnership)	CSR 7728-E
)	
Petition for Determination of Effective Competition in Various Texas Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 2008

Released: May 8, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Entertainment – Advance/Newhouse Partnership (“Time Warner”), hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the communities listed on Attachment A and hereinafter referred to as “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(2).

³47 C.F.R. § 76.906.

⁴See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁶ This test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁷

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability. The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.⁸ Petitioner has demonstrated that this is the case.⁹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.¹⁰ Time Warner indicates that the program offerings are available on the websites of both DIRECTV and Dish, and we have reviewed their websites and confirmed that their program offerings meet the test.¹¹ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹² Accordingly, we find that the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner states that it is the largest MVPD in all but one of the Communities.¹³ With regard to the City of Leander, Petitioner is unable to prove which MVPD is the largest.¹⁴ Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis and using a five-digit allocation formula previously approved by the Commission.¹⁵

7. Based on the data provided, the failure to identify the largest MVPD in the City of

⁶47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷47 C.F.R. § 76.905(b)(2)(i).

⁸*Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

⁹ Petition at 4-6, 8-9.

¹⁰*See* 47 C.F.R. § 76.905(g). *See also* Petition at 6.

¹¹*See* Petition at 6-7.

¹²*See* Petition at 7.

¹³Petition at 8.

¹⁴Petition at 8.

¹⁵Petition at 9. *See also*, *Charter Communications Properties, LLC*, 17 FCC Rcd 4617 (2002); *Charter Communications*, 17 FCC Rcd 15491 (2002); *Falcon First, Inc.*, 17 FCC Rcd 16629 (2002); *Falcon Community Cable, L.P.*, 17 FCC Rcd 22162 (2002); *Charter Communications, LLC*, 19 FCC Rcd 7003 (2004).

Leander is not fatal. While it is undetermined which provider is the largest in this community, the DBS subscriber penetration level that was calculated using Census 2000 household data¹⁶ reflects that the aggregate subscribership for the DBS Providers in the City of Leander is 32.84 percent and Petitioner's subscriber total in the community exceeds 15 percent.¹⁷ Because Petitioner and the DBS providers each serve more than 15 percent of the households in the City of Leander, the subscriber base of any MVPD, other than the largest, exceeds the 15 percent threshold in this community.

8. With respect to the other Communities, based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁸ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

9. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Entertainment – Advance/Newhouse Partnership **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the Communities set forth on Attachment A **IS REVOKED**.

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
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¹⁶Petition at 8, and Exhibit E.

¹⁷See Petition at 8, and Exhibits A & E.

¹⁸Petition at 9, and Exhibit E.

¹⁹47 C.F.R. § 0.283.

ATTACHMENT A

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Communities	CUID	CPR*	2000 Census Household	Estimated DBS Subscribers
Bastrop	TX0596	27.60	2034	561
	TX2076			
Bee Cave	TX2249	18.65	207	39
Bertram	TX1089	49.09	387	190
Briarcliff	TX2095	49.30	369	182
Buda	TX1070	19.56	866	169
Cedar Park	TX0766	22.09	8621	1904
Dripping Springs	TX1242	41.64	554	231
Elgin	TX0700	35.98	1869	672
Hays	TX1112	19.56	88	17
Hutto	TX1244	25.83	398	103
Jonestown	TX1351	24.49	699	171
Kyle	TX0895	18.18	1491	271
	TX2154			
	TX2321			
Lago Vista	TX1182	63.24	1944	1229
Leander	TX1422	32.84	2522	828
Liberty Hill	TX1095	51.95	459	238
Manor	TX2332	34.61	405	140
Mountain City	TX2154	19.56	215	42
Round Rock	TX0454	17.83	21076	3758
Smithville	TX0128	34.37	1491	512
	TX2161			
Taylor	TX0138	22.60	4730	1069
The Hills	TX2251	18.65	585	109
Thorndale	TX0965	37.57	485	182
Thrall	TX1088	40.70	255	104
Uhland	TX2336	18.18	134	24